Official Business
OF THE
COMMISSION OF FINE ARTS

FOR: CHA----re: Freedom of Information Act exemptions.

I disagree with Mr. Muir on one point: if we are not an agency under the meaning of exception (b)(5) of the Freedom of Info. Act; then the entire act should not apply to our office-- The act refers throughout to agency, with no change in definition from one clause to another. If, as the opinion of the court seems to indicate, we are not an agency, then, we need not follow the other provisions of the act.

Also, the court opinion is that we cannot be both an advisory committee and an agency--I see no reason that this is necessarily so.

DM 1/21/76

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January 8, 1976

Charles H. Atherton, Secretary
U.S. Commission of Fine Arts
708 Jackson Place, N.W.
Washington, D.C. 20006

Dear Charlie:

Some recent Court opinions concerning the availability to advisory committees of the (b)(5) exemption of the Freedom of Information Act have just come to my attention. The gist of these opinions is that the (b)(5) exemption ("intra-agency memoranda") applies only to Federal "agencies," and not to "advisory committees." Under their reasoning, the only occasion an advisory committee may take advantage of such an exemption is when it considers a memorandum prepared by a distinct Federal agency; it is not available for its own internal papers or discussions. Wolfe v. Weinberger, Dist.Ct. D.C.Civil # 74-454, October 31, 1975; Nader v. Dunlop, 370 F.Supp. 177 (D.D.C.1973).

While neither case is the pronouncement of a court of appeals, no appeal was taken in either action, so they must be given considerable weight.

Under these decisions, the only exemptions to the open meeting requirement of the Advisory Committee Act are those Freedom of Information Act exceptions other than exception (b)(5). Those which are relevant to the Commission of Fine Arts are: (b)(3), matters exempted from disclosure by Statute; (b)(4), trade secrets and commercial or financial information obtained from a person and privileged or confidential; and (b)(6), personal or medical files and similar files, the disclosure of which constitute a clearly unwarranted invasion of personal privacy.

I also enclose a draft of a regulation prepared by the Department of Justice and OMB for fleshing out the Federal Advisory Committee Act. I understand It was never promulgated because of differences between the individuals at OMB and Justice over various details. Nevertheless, they may be helpful to you in considering the Commission's obligations under that act since they do reflect as to most issues the considered judgment of those agencies.

If you have any questions, I will, as always, be glad to hear from you.

Sincerely,

J. Dapray Muir

JDM/mjb

Volume 103 - Number 229 - Page 2021 Wednesday, November 26, 1975

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U.S. District Court

GOVERNMENT INFORMATION
Advisory Panel

Food and Drug Administration Over the Counter Antacid Drugs Advisory Review Panel is not "agency" under Freedom of Information Act and transcripts of its meetings are not exempt from disclosure under that Act or Advisory Committee Act.

WOLFE v. WEINBERGER, Dist. Ct. D.C. Civil No. 74-454, October 31, 1975. *Opinion* per Richey, J. *Larry P. Ellsworth* and *Anita Johnson* for the plaintiff. *Earl J. Silbert, Arnold T. Aikens, Peter C. Schaumber, Peter Barton Hutt* and *Thomas Scarlett* for the defendant.

RICHEY, J.: This is an action in which plaintiff, Dr. Sidney Wolfe, seeks to compel the production by the Department of Health, Education, and Welfare of the transcripts of all meetings of the Food and Drug Administration's Over-the-Counter Antacid Drugs Advisory Review Panel (hereinafter, "the Antacid Panel"). The meetings in question took place between February 22, 1972, and January 9, 1973. On December 17, 1973, plaintiff Wolfe requested the transcripts from the FDA, which is a unit of the Department of Health, Education and Welfare, in a letter in which he invoked the Freedom of Information Act, 5 U.S.C. §552, as the basis for his request. On January 21, 1974, his request was denied in a letter by the Acting Assistant Commissioner for Public Affairs of the FDA. On January 25, 1974, Wolfe appealed the denial to Dr. Charles C. Edwards, Assistant Secretary for Health, Education and Welfare. With his appeal unanswered, Wolfe filed this action on March 20, 1974. On May 15, 1974, Dr. Edwards denied Wolfe's request on appeal, concluding that "transcripts of those meetings must be regarded as internal agency records reflecting the deliberations of those engaged in the policy-making process, and thus exempt from disclosure under 5 U.S.C. §552(b)(5) . . . ."

Jurisdiction in this case is based upon the Freedom of Information Act, 552(a)(3). Plaintiff claims that disclosure is compelled by 5 U.S.C. §552(a)(3), which provides, in pertinent part, that: ". . . each agency, on request for identifiable records . . . shall make the records promptly available to any person." Plaintiff also contends that disclosure is required by §10(b) of the Federal Advisory Committee Act, 5 U.S.C. App. I, which provides, in pertinent part, that: ". . . the records, reports, transcripts, minutes, . . . or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection . . . ." The defendant's response, as noted above, is that exemption five of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," interposes a bar to discovery under the Act. With respect to plaintiff's claim under the Advisory Committee Act, defendant points out that the discovery rights granted by §10(b) of that statute are specifically made "subject to section 552 of Title 5," including the exemptions thereto. Accordingly, defendant again invokes the (b)(5) exemption as to plaintiff's Advisory Committee Act claim.

The case is currently before the Court on cross-motions for summary judgment. Both parties assert, and the Court agrees, that no material facts are in issue. The case turns on the availability of the (b)(5) exemption, to shield records of this advisory committee, sought under the Freedom of Information Act and the Advisory Committee Act.

II. DISCUSSION

A. *The Antacid Panel is not an Agency Within the Meaning of the (b)(5) Exemption.*

As noted above, plaintiff claims that the transcripts of the panel's meetings must be disclosed as "identifiable records" under the Freedom of Information Act. Defendant apparently does not deny that the panel is an advisory committee, that the transcripts are in the possession of the Department of Health, Education and Welfare, or that the transcripts are "records" within the meaning of the Freedom of Information Act. However, defendant submits that the panel functions "as an integral part of a public rulemaking process" and is a body consisting "of special government employees whose deliberations are functionally equivalent to those of full-time agency employees who review scientific problems and make recommendations for regulatory action." In short, the defendant's position would seem to be that, in addition to being an advisory committee, the panel is an agency within the meaning of the Freedom of Information Act, specifically exemption (b)(5), and that its deliberations are therefore entitled to protection from disclosure within the terms of that exemption.

In order to determine whether the panel is an agency within the meaning of (b)(5), it is first necessary to briefly consider the nature of the panel's role in the FDA's Over-the-Counter (OTC) Drug Review Program. The goal of the program as a whole is to establish regulations specifying the conditions under which over-the-counter drugs, divided into various therapeutic categories (such as antacids) for purposes of the program, are to be considered as safe and effective and not misbranded. For each therapeutic category, a panel of experts (such as the Antacid Panel) is appointed to receive and evaluate information on drugs. The panel receives written data and views and hears oral presentations from all interested parties. It also discusses and evaluates such submissions and presentations. (In the case of the Antacid Panel, those discussions were closed to the public and are

Cont'd. on p. 2025 - Panel)

U.S. Court of Appeals

ADMINISTRATIVE LAW
Prison Rules

Bureau of Prisons is "agency" under Administrative Procedure Act and its policy statements are rules which are subject to the Act.

RAMER, ET AL. v. SAXBE, U.S. App. D.C. No. 74-1483, November 6, 1975. *Reversed and remanded* per Christensen, J. (D. Utah) (Bazelon, C.J., concurs; MacKinnon, J., concurs specially). *Charles E. Lister* with *Herbert Dym* and *Robert Plotkin* for appellants. *Bette E. Uhrmacher* with *Earl J. Silbert, John A. Terry* and *Thomas G. Corcoran, Jr.*, for appellee. Trial Court—Flannery, J.

CHRISTENSEN, J.: The contention that the "policies" of the Bureau of Prisons have never been considered "rules" within the contemplation of the Administrative Procedure Act and therefore never should be, and the counterpoint that had they been the resulting broader input into them and more understanding compliance with them would constitute a much needed and salutary reform of the Federal Prison System, come along and between the lines of the briefs like Sandburg's Fog. However, such a confrontation will have to move on to another time or case. The district court, having permitted prisoners complaining of lack of compliance by the Bureau with APA to cross the threshold, unceremoniously ushered them back to it after almost a year of considering motions to transfer, to bring in new parties, to amend and for summary judgment, and sent them piking up to this court by deciding *sua sponte* that their cause was not justiciable.

The validity, or more descriptively the invalidity, of the latter ruling is all that need be decided here, aside from the government's claim of post-appeal mootness which we reject. We agree with appellees that rather than attempt to determine now what specific "policies" or rules must be published to satisfy the Act, further processing of the problem by the district court would be desirable, and we therefore remand. But to give point to such remand we recognize in the context of this case that the Bureau of Prisons is, indeed, an "agency" within the definition of the APA, 5 U.S.C. §551, and that its rule making is subject to applicable requirements of that Act.

* * *

There is no necessity for rewalking the grounds since explored and occupied by

(Cont'd. on p. 2023 - Rules)

TABLE OF CASES

United States Court of Appeals

United States District Court

within the requirements of § 553 as well as § 552(a)(1)(D). But the dismissal on the ground of nonjusticiability precluded development of a record adequate for precise identification, differentiation and definition in the context of this case. Moreover, questions of remedy have not even been touched upon, and in other respects it would be appropriate for the trial court to complete its consideration of the issues beyond the threshold bar it improvidently created.

Accordingly, the order of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion, including reconsideration in light of Rule 15(a) Fed.R.Civ.P. of any renewed application to add additional parties plaintiff. Cf. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

Reversed and remanded.

MacKINNON, J. (concurring specially):

I agree that the District Court erred in dismissing the complaint on grounds of nonjusticiability and I also agree that the case is not moot. As this is sufficient to justify reversing and remanding the case for further proceedings, I concur in the result reached by the majority.

The Bureau of Prisons admits that the material appellants seek are "policy statements." Under the Administrative Procedure Act, such statements either must be published in the Federal Register if they are "statements of general policy," or else must be made available to the public for inspection and copying. Thus appellants are clearly entitled to disclosure of the Bureau's "policy statements" in some manner. However, I agree that consideration of the appropriate relief to be afforded appellants is best left to the District Court in the first instance.

I am not in agreement with the suggestion that our decision in *Pickus v. U.S. Board of Parole*, 165 U.S.App.D.C. 284, 507 F.2d 1107 (1974), is completely controlling here. Like the Board of Parole, the Bureau of Prisons is undoubtedly an "agency" for the purposes of complying with the APA. However, as to appellants' contention that the "policy statements" are "rules" with respect to which the Bureau is required to give notice of proposed rulemaking under 5 U.S.C. § 553 before they may be adopted or amended, it is at least arguable that parole regulations may be subject to stricter rulemaking requirements than prison policies for the daily operation of penal institutions. Some of these policies may not have the substantial effect on the rights of persons subject to agency regulations which *Pickus* holds is the test for applying the notice and hearing requirement. The court will need considerably more than the present meager

record before the application of section 553 to these "policy statements" can be adequately assessed. At this stage of the proceedings, I would not suggest that *Pickus* has authoritatively disposed of the issues presented by this complaint.

PANEL

(Cont'd. from p. 2021)

the subject of the transcripts to which the plaintiff seeks access in this action.) The end product of the panel's deliberations is a report to the Commissioner of the FDA containing the panel's conclusions as well as recommended regulations. The Commissioner reviews the panel's recommendations and formulates proposed regulations for publication in the Federal Register. The Commissioner can, and on occasion does, simply adopt *in toto* the panel's recommendations. Opportunity for public comment and objection is provided before the Commissioner promulgates the final regulations.

It cannot be doubted that OTC panels perform a crucial role in the decision-making process. In the instant case, the Commissioner adopted the OTC Antacid Panel report as his own. But, as the Court of Appeals for this Circuit has stated, ". . . the degree of scrutiny its [an advisory panel's] decisions are given on review is . . . beside the point" in determining whether that panel is an agency. *Washington Research Project, Inc., v. Department of Health, Education and Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974). "The important consideration," the court continued, "is whether it has any authority in law to make decisions." *Id.* The FDA has, in effect, admitted (and the description of the drug review program contained in the pleadings in this case certainly indicates) that the OTC Antacid Panel has no such authority. In the final regulations adopted as a result of the review of over-the-counter antacid drugs by the panel and the Commissioner, the Commissioner noted:

> "Some of the comments reflected an erroneous impression about the role of a panel in the OTC drug review. Pursuant to section 9(b) of the Federal Advisory Committee Act, the OTC drug review panels are utilized *solely for advisory functions*. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations to the Food and Drug Administration *must be made solely by the Commissioner*." 39 *Fed.Reg.* 19862 (June 4, 1974) (emphasis added).

It is clear to this Court that the Antacid Panel does not have that "substantial independent authority in the exercise of specific functions" which would qualify it as an "agency" within the meaning of the Freedom of Information Act. *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). Accordingly, the (b)(5) exemption to the Act for "inter-agency or intra-agency memorandums" is not available to prevent disclosure of the panel's deliberations as recorded in the transcripts, for the panel is not an "agency" within the meaning of the Act and, specifically, the (b)(5) exemption.

B. *The (b)(5) Exemption is Inapplicable to the Antacid Panel Under the Scheme of the Federal Advisory Committee Act, as Read in Conjunction with the Freedom of Information Act.*

Defendant asserts that the Federal Advisory Committee Act explicitly recognizes an advisory committee's right to invoke (b)(5) for discovery of advisory committee records under the Act is made subject to the Freedom of Information Act, including the exemptions thereto. This Court's reading of the two statutes leads to precisely the opposite conclusion. In *Gates v. Schlesinger*, 366 F.Supp. 797 (D.D.C. 1973), *appeal dismissed*, D.C. Cir. No. 74-2013 (Jan. 23, 1975), Judge Aubrey Robinson articulated a convincing argument to the effect that an advisory committee cannot have a "double identity" as an agency and thus cannot invoke the (b)(5) exemption:

> "The Federal Advisory Committee Act utilizes the definition of agency contained in the Administrative Procedure Act, 5 U.S.C. § 551(1), which is applicable also to the Freedom of Information Act. It is significant that the Federal Advisory Committee Act contains a separate and distinct definition of an 'advisory committee,' thus supporting the proposition that an advisory committee is not an 'agency'." 366 F.Supp. at 798-99 (footnote omitted).

The Court concurs in Judge Robinson's reasoning. The Court also notes that the definition of "advisory committee" in the Advisory Committee Act specifically excludes "any committee which is composed wholly of fulltime officers or employees of the Federal Government," thus providing further evidence that "agency" and "advisory committee" were not meant by Congress to be congruent concepts. See § 3(2) of the Advisory Committee Act.

Defendant asserts that to conclude that the (b)(5) exemption is not available to shield transcripts of Antacid Panel deliberations would be tantamount to ignoring the clear language of the Advisory Committee Act, which specifically makes the Freedom of Information Act exemptions available to advisory committees. Such a conclusion is not necessarily warranted, however, for this Court could merely adopt an interpretation of the Advisory Committee Act, suggested by Judge June Green in *Nader v. Dunlop*, 370 F.Supp. 177 (D.D.C. 1973), which would make (b)(5) available to an advisory committee when it *considers* an actual agency memorandum otherwise protected by that exemption. In the context of the present case, however, such an exemption would be of no use to defendant, for, as noted above, defendant seeks to shield transcripts of the committee's actual deliberations under the (b)(5) umbrella. Moreover, this Court finds that an interpretation of the Advisory Committee Act which would allow defendant to invoke (b)(5) in the context of this case would be in clear contravention of the purpose of the Act, as revealed by its legislative history, to insure "openness in the operations of advisory committees" and to allow "public access to [their] deliberations." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 10 (1972). In *Gates, supra*, a case in which the Department of Defense sought to invoke (b)(5) to close to the public working sessions of one of its advisory committees, Judge Robinson stated:

> "Congress established openness to public scrutiny as the keystone of the Advisory Committee Act. Arguments that public participation and disclosure would inhibit debate and the frank expression of views were heard and rejected by Congress. . . . In the circumstances of this case, the Court finds exemption 5 inapplicable by its terms and irreconcilable by result with the very purpose of the Federal Advisory Committee Act." 366 F.Supp. at 799-800 (footnote omitted); see also legislative history sources cited at n.9, 366 F.Supp. at 800.

Notably, several other members of this court have also considered this very issue, the applicability of (b)(5) to advisory committees, and have come to similar conclusions. *Aviation Consumer Action Project v. Washburn*, C.A. No. 1838-73 (D.D.C. Sept. 10, 1974) (Bryant, J.), *appeal docketed*, No. 75-1086 (D.C. Cir.); *Don't Tear it Down, Inc., v. Sampson*, C.A. No. 74-381 (D.D.C. April 16, 1974) (Gasch, J.); *Nader, supra*. In this case, to allow the Antacid Panel to avail itself of the (b)(5) exemption in denying requests for transcripts of the panel's meetings would be tantamount to burying the type of deliberations which the Advisory Committee sought to bring to the light of day. This Court cannot accept defendant's literalistic approach to the statute and will not, as Judge Learned Hand put it, "be bound by the letter, when it frustrates the patent purpose of the whole statute." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945); *see N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

C. *Additional Considerations.*

Two additional points must be made in considering the contentions of the parties. First, it is important to understand exactly what the defendant is and is not claiming with respect to the (b)(5) exemption. Defendant's position is that the "records" in question (the transcripts of the Antacid Panel's deliberations) are memoranda within an "agency," i.e. the committee itself. Defendant does not claim that these transcripts are deliberative memoranda within the larger agency, the FDA. The latter situation arose in *Washington Research Project, Inc. v. Department of Health, Education, and Welfare*, 504 F.2d 238 (D.C. Cir. 1974). The documents in question in that case were reports prepared by a panel, known as an "initial review group," of the National Institute of Mental Health, which is a unit of the Department of Health, Education, and Welfare. The Court of Appeals rejected the contention that the initial review group was an agency within the meaning of the Freedom of Information Act and found instead that the group was an advisory committee and, as such, "merely a unit within another agency." *Id.* at 245. As in the instant case, the documents were in the possession of the parent agency. Unlike the instant case, however, the documents in *Washington Research Project* were relied upon by the agency in the course of decision-making. The documents were "an integral part of the deliberative process," of the agency, *id.* at 250, and as such were entitled to the protection afforded by the (b)(5) exemption, since they were internal agency memoranda. In the instant case, defendant does not claim that the transcripts in question were part of the agency's deliberative process. To the contrary, defendant acknowledges that the transcripts "form no part of the record transmitted to, or read or relied upon by the Commissioner. The Commissioner bases his decision exclusively on the contents of the panel's report and supporting minutes, and the evidence on which the report is based."

Second, it should be noted that the applicability of the Federal Advisory Committee Act to this case is problematical. The Act became effective on January 5, 1973. 5 U.S.C. App. I, § 15. All but one of the transcripts in question are of meetings which took place before that date. Thus, unless this Court were to apply the Act retroactively, plaintiff could not maintain his claim for transcripts of meetings that occurred prior to the effective date of the Act. In addition, defendant's position that the Advisory Committee Act explicitly recognizes the applicability of the (b)(5) exemption to advisory committees would be undermined. However, in light of this Court's holding that the transcripts are available under the Freedom of Information At, it is not necessary to reach the retroactivity issue.

III. CONCLUSION

This Court holds that the Antacid Panel is not an agency within the meaning of exemption (b)(5) of the Freedom of Information Act. Further, this Court rejects defendant's assertion that the Federal Advisory Committee Act recognizes the applicability of 5 U.S.C. § 552(b)(5) to advisory committees and finds that the (b)(5) exemption is inherently inapplicable to advisory committees. Accordingly, the defendant must make the requested transcripts promptly available to plaintiff, in compliance with the requirements of the Freedom of Information Act, 5 U.S.C. § 552.

CLASSIFIED

SITUATION DESIRED

WHARTON B.S. (Finance) '72, Antioch J.D. '75, D.C. Bar Candidate seeks law clerk position. Experienced. Box 1469, c/o WLR. 11x11/20

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Research & Preparation Appeals, D.C. Md. & Va. and Supreme Court. Neil Vee - 870-3439. 1 mo.

PROCESS SERVER

HEALTH EFFECTS CONSULTANT—For occupational & environmental chemical exposure. Dr.

C., for plaintiffs.

Harlington Wood, Jr., Asst. Atty. Gen., Harold H. [illegible] Jr., U. S. Atty., Washington, D. C., William E. Nelson, William C. White, John Bradley, Justice Dept., Washington, D. C., for defendants.

MEMORANDUM OPINION

JUNE L. GREEN, District Judge.

[1] This matter is before the Court on cross motions for summary judgment. At issue is the exclusion of the public from the meetings of the advisory committees serving the Cost of Living Council. Plaintiffs contend that the Federal Advisory Committee Act (5 U.S.C. App. I, P.L. 92-463) requires that the various advisory committee meetings (those committees are: the Food Industry Advisory Committee; the Food Industry Wage & Salary Committee; and the Health Advisory Committee) be open to the public. The defendants argue that the meetings are being closed under authority of § 10(d) of the Act and the applicable guidelines (38 F.R. 2306, January 23, 1973), which provide that a meeting may be closed when it is determined by the Agency head that such meeting will involve matters listed in 5 U.S.C. § 552(b) the Freedom of Information Act.

More specifically, the defendants contend that the meetings were closed because they "would consist of an exchange of opinions and that the discussion, if written, would fall within exemption 5 of U.S.C. § 552(b) and that it was essential to close such meetings to protect the free exchange of internal views and to avoid undue interference with committee operations." (Section 10a(3)(C) of the Joint Memorandum of the Office of the Budget and the Defendants' Motion to Dismiss at 4.) Plaintiff agrees that in certain situations, the § 5 exemption may be invoked to close or partially close a meeting to the public. However, plaintiff contends that § 5 should not apply to protect all internal deliberations of the advisory committees, and that the § 5 exemption should not be applied in an automatic, blanket manner. (Only one portion of one advisory committee meeting has been open to the public, the remaining meetings were closed on the basis of § 5.) (Plaintiffs' Proposed Findings . . . nos. 3, 4.)

[2] The Court believes that defendants' broad application of the § 5 exemption to include all deliberative conversations of the committee meetings is clearly contrary to Congressional intent and the policy of the Act. As stated by Senator Percy, "the second major element of the bill is its provisions for opening up advisory committees to public scrutiny".[1] Concern was expressed that in too many instances, advisory committees were consulting with government offices on important policies and decisions without an adequate guarantee that the public interest was being served.[2] The legislative history further demonstrates that Congress rejected contentions that public participation would destroy the advisory process.[3]

In a recent decision of this Court, Judge Aubrey E. Robinson, Jr. analyzed the § 5 exemption as applied to the meetings of the Defense Advisory Committee on Women in the Services. He found "exemption 5 inapplicable by its terms and irreconcilable by result with the very purpose of the Federal Advisory Committee Act." Gates v. Schlesinger, 366 F.Supp. 797 (D.D.C. decided October 10, 1973). This Court, too, finds the express Congressional intent to provide

1. 118 Cong.Rec. S14644 at S14649 (daily ed. September 12, 1972) (Remarks of Senator Percy).

2. *Id.*

3. 118 Cong.Rec. H4275-86 (daily ed. May 9, 1972); 118 Cong.Rec. H8454 (daily ed. Sept. 18, 1972); 118 Cong.Rec. S95285-86 (daily ed. Sept. 19, 1972); 118 Cong.Rec. H8610-11 (daily ed. Sept. 20, 1972); H.R.Rep.No. 1017, 92nd Cong., 2nd Sess. (1972).

the defendants' expansive reading of the § 5 exemption.

[3, 4] While the defendants contend that they have not adopted "such an expansive construction" as would close all advisory committee meetings, (Defendants' Motion to Dismiss, p. 23) it appears that such has been the case. This Circuit has recently criticized the broad-based, conclusory assertions often made by the Government to invoke Freedom of Information Act protections. Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973). Thus, said the Court of Appeals, "the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information". [footnote omitted]. *Vaughn, supra* 484 F.2d at 825. Here, the defendants are sweeping entire advisory committee meetings under the general allegation of a § 5 exemption. The defendants have not offered any specific reasons for closing the meetings.[4] Although the Advisory Committee Act does not contain the same express provisions as the Freedom of Information Act which places the burden of proof on the agency to sustain its action, this Court would agree with Judge Robinson in Gates v. Schlesinger, *supra*, 366 F.Supp. at 799, that the underlying policy considerations are identical and that the burden of proof should be comparable. The defendants should, at a minimum, provide "a relatively detailed analysis" of the bases for closing various portions of the meetings. Vaughn v. Rosen, *supra*, 484 F.2d at 826.

The Freedom of Information Act, as interpreted by case law, also requires that where portions of some documents (or, in this case, meetings) may be exempt from disclosure, the non-exempt (i.

4. Those notices which have appeared in the Federal Register announcing—and closing—the meetings of the advisory committee have stated: "The Director of the Cost of Living Council has determined that the meeting will consist of exchanges of opinions; the discus-

gineering Corp. v. Renegoti 138 U.S.App.D.C. 147, 425 C.Cir. 1970); Environmenta Agency v. Mink, 410 U.S. 827, 35 L.Ed.2d 119 (1973 den of showing that it woul ble or unfeasible to sever such nonexempt material is ernment. By analogy to problem, the defendants sho burden of showing specific *portions* of all meetings sho

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ORDER

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E. Nelson, Wil-
Bradley, Justice
C., for defend-

OPINION

District Judge.

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[2] The Court believes that defendants' broad application of the § 5 exemption to include all deliberative conversations of the committee meetings is clearly contrary to Congressional intent and the policy of the Act. As stated by Senator Percy, "the second major element of the bill is its provisions for opening up advisory committees to public scrutiny".[1] Concern was expressed that in too many instances, advisory committees were consulting with government offices on important policies and decisions without an adequate guarantee that the public interest was being served.[2] The legislative history further demonstrates that Congress rejected contentions that public participation would destroy the advisory process.[3]

In a recent decision of this Court, Judge Aubrey E. Robinson, Jr. analyzed the § 5 exemption as applied to the meetings of the Defense Advisory Committee on Women in the Services. He found "exemption 5 inapplicable by its terms and irreconcilable by result with the very purpose of the Federal Advisory Committee Act." Gates v. Schlesinger, 366 F.Supp. 797 (D.D.C. decided October 10, 1973). This Court, too, finds the express Congressional intent to provide

3. 118 Cong.Rec. H4275-86 (daily ed. May 9, 1972); 118 Cong.Rec. H8454 (daily ed. Sept. 18, 1972); 118 Cong.Rec. S95285-86 (daily ed. Sept. 19, 1972); 118 Cong.Rec. H8610-11 (daily ed. Sept. 20, 1972); H.R.Rep.No. 1017, 92nd Cong., 2nd Sess. (1972).

the defendants' expansive reading of the § 5 exemption.

[3, 4] While the defendants contend that they have not adopted "such an expansive construction" as would close all advisory committee meetings, (Defendants' Motion to Dismiss, p. 23) it appears that such has been the case. This Circuit has recently criticized the broad-based, conclusory assertions often made by the Government to invoke Freedom of Information Act protections. Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973). Thus, said the Court of Appeals, "the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information". [footnote omitted]. *Vaughn, supra* 484 F.2d at 825. Here, the defendants are sweeping entire advisory committee meetings under the general allegation of a § 5 exemption. The defendants have not offered any specific reasons for closing the meetings.[4] Although the Advisory Committee Act does not contain the same express provisions as the Freedom of Information Act which places the burden of proof on the agency to sustain its action, this Court would agree with Judge Robinson in Gates v. Schlesinger, *supra*, 366 F.Supp. at 799, that the underlying policy considerations are identical and that the burden of proof should be comparable. The defendants should, at a minimum, provide "a relatively detailed analysis" of the bases for closing various portions of the meetings. Vaughn v. Rosen, *supra*, 484 F.2d at 826.

The Freedom of Information Act, as interpreted by case law, also requires that where portions of some documents (or, in this case, meetings) may be exempt from disclosure, the non-exempt (i.

4. Those notices which have appeared in the Federal Register announcing—and closing—the meetings of the advisory committee have stated: "The Director of the Cost of Living Council has determined that the meeting will consist of exchanges of opinions; the discussions, if written, would fall within exemption 5 of 5 U.S.C. § 552(b); and it is essential to close the meetings to provide the free exchange of internal views and to avoid interference with the operation of the committee."

gineering Corp. v. Renegotiation Board, 138 U.S.App.D.C. 147, 425 F.2d 578 (D.C.Cir. 1970); Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). The burden of showing that it would be impossible or unfeasible to sever and release such nonexempt material is on the government. By analogy to the present problem, the defendants should bear the burden of showing specifically that all *portions* of all meetings should be closed.

The importance of the Federal Advisory Committee Act is epitomized by Senator Metcalf who handled the legislation in the Senate:

> What we are dealing with here goes to the bedrock of government decision making. Information is an important commodity in this Capital.
>
> Those who get information to policymakers, or information for them, can benefit their causes whatever it [sic] may be. Outsiders can be adversely and unknowingly affected. And decisionmakers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about the meetings—and could not get in the door if they did—may not make tempered judgments. 118 Cong.Rec. S15285-86 (daily ed. September 19, 1972).

This court will not allow the door to close on these meetings when Congress has expressly ordered the door be open except on the rarest occasions.

ORDER

Upon consideration of the Cross Motions for Summary Judgment, it is by the Court this 9th day of November 1973,